

## **ADVISORY OPINION 2007-002**

**Any advisory opinion rendered by the Registry under subsection (1) or (2) of this section may be relied upon only by the person or committee involved in the specific transaction or activity with respect to which the advisory opinion is required. KRS 121.135(4).**

July 3, 2007

Kerry S. Morgan  
General Counsel  
Kentucky Democratic Party  
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Dear Ms. Morgan:

We received your written request for an advisory opinion on June 7, 2007, on behalf of the Kentucky Democratic Party (the "KDP").

In your request, you provided us the following facts: The KDP is seeking guidance on behalf of the KDP, its nominees for statewide office in the general election to be held on November 6, 2007, and all employees, agents, volunteers, consultants and other persons acting on behalf of either the party or its individual statewide nominees. You note that the Registry issued KREF Advisory Opinion 2003-003 setting forth the Registry's position under the law as it existed at that time. Since then, the General Assembly has repealed the public financing of gubernatorial elections in its entirety and made several other changes to Kentucky campaign finance law. Due to these changes, the KDP requests that the Registry revisit its opinions as expressed in KREF Advisory Opinion 2003-003. For the purposes of your request, you state that the term "statewide nominee" includes the Democratic slate of candidates for Governor and Lieutenant

Governor, Attorney General, Treasurer, Auditor of Public Accounts, and Commissioner of Agriculture. Accordingly, the KDP has raised the following specific questions:

- (1) Is there a limit on what the KDP can give to its statewide nominees, including the slate for Governor and Lieutenant Governor, so long as the contributions are properly reported?

During the 2005 Regular Session, the Kentucky General Assembly repealed the public financing of gubernatorial elections under KRS Chapter 121A (otherwise known as the Public Financing Campaign Act) in its entirety. Gubernatorial slates are now treated like any other candidate for state office in terms of contribution limits. Therefore, there is no limit on what the KDP may contribute to any statewide nominee, including a slate of candidates running for Governor and Lieutenant Governor. However, there is a limit on how much a statewide nominee may accept from executive committees, as discussed in more detail below.

- (2) May a statewide nominee accept, in the aggregate from executive committees of any county, district, state, or federal political party, an amount in excess of fifty percent (50%) of the total contributions accepted by the candidate?

No. KRS 121.150(24) restricts the amount a statewide nominee, including a gubernatorial slate, may accept in the aggregate from executive committees of any county, district, state or federal political party to the greater of \$10,000.00 or fifty percent (50%) of the total contributions accepted by the statewide nominee per election.

- (3) May a statewide nominee's campaign use without charge office space and equipment (i.e., telephone, copier, fax, printer, postage machine) paid for by the political party? If so, should such use be reported as an in-kind contribution based on fair market value?

A "contribution" under KRS 121.015(6) specifically includes an in-kind contribution. An in-kind contribution is a non-monetary contribution consisting of goods or services offered for free or at less than the usual charge. However, such in-kind contributions are not subject to the reporting requirements under KRS 121.180 until the aggregate value per contributor exceeds \$100.00 per election.

The provision of office space and equipment without charge would constitute a contribution from the political party to the statewide nominee, assuming the aggregate value exceeds \$100.00 per election. The office space and equipment would be reported as in-kind contributions to the respective statewide nominees with the amount based on fair market value.

Furthermore, there is nothing in KRS Chapter 121 to prohibit a statewide nominee from renting office space and equipment from the political party so long as fair market value is paid.

- (4) May a statewide nominee's campaign and a political party share a consultant for fundraising purposes? May the political party pay 100% of the expenses for the fundraising event, including the consultant's fees, so long as the costs are appropriately allocated and reported as in-kind contributions to the statewide nominee?

There is nothing to prohibit a political party and its statewide nominees from sharing a consultant for fundraising purposes, provided that the political party and each campaign utilizing the services of the consultant pay for its own or its representative share of events and expenses (including the consultant's fees). If the political party decides to pay 100% of the expenses for the fundraising event, or more than its representative share, the appropriately allocated costs would be reported as in-kind contributions to the respective statewide nominees.

- (5) Under what circumstances may a political party or statewide nominee share polling data with other statewide nominees or the political party?

An executive committee of a political party could share polling data with a statewide nominee. Since the poll would add value to the campaign, sharing the data would constitute a reportable in-kind contribution. See KREF Advisory Opinions 1995-004 and 2003-003.

However, KRS 121.180(10) clearly prohibits a candidate from using "funds solicited or received for the person...to further the candidacy...of any other person for public office...." Therefore, a statewide nominee may not share polling data paid for with campaign funds with any other statewide nominees or the political party unless fair market value was paid for the polling data.

- (6) May a political party produce and distribute, at its expense, bumper stickers or other advertising advocating for any or each of its statewide nominees? How must this be reported? If the production and distribution occurs without a request from the candidate, is there a difference in the reporting requirements?

A political party may produce and distribute, at its expense, bumper stickers or other advertising advocating for any or each of its statewide nominees. Depending on the circumstances (as further described below), this activity would be classified as either an independent expenditure or an in-kind contribution with different reporting requirements.

KRS 121.015(12) defines an “independent expenditure” as follows:

[T]he expenditure of money or other things of value for a communication which expressly advocates the election or defeat of a clearly identified candidate or slate of candidates, and which is made without any coordination, consultation, or cooperation with any candidate, slate of candidates, campaign committee, or any authorized person acting on behalf of any of them, and which is not made in concert with, or at the request or suggestion of any candidate, slate of candidates, campaign committee, or any authorized person acting on behalf of any of them.

(Emphasis added.) A political party may not communicate with a campaign regarding an independent expenditure prior to the time that the expenditure is made. KRS 121.150(1). When an expenditure is made under these circumstances, there is no limitation on the amount of an independent expenditure made by a political party. See Buckley v. Valeo, 424 U.S. 1 (1976). However, a political party must report its independent expenditures when they exceed five hundred dollars (\$500) in the aggregate during any one election. KRS 121.150(1).

If there is any contact or communication between the political party and the statewide nominee concerning the advertising, either directly or indirectly, then the payment for advertising must be reported as an in-kind contribution. The definition of a “contribution” under KRS 121.015(6) specifically includes in-kind contributions which are:

[g]oods, advertising, or services with a value of more than one hundred dollars (\$100) in the aggregate in any one (1) election which are furnished to a candidate, slate of candidates, committee, or contributing organization or for inauguration activities without charge, or at a rate which is less than the rate normally charged for the goods or services...

Once the aggregate value per contributor exceeds \$100.00 per election, in-kind contributions are treated as any other contribution and are subject to the reporting requirements under KRS 121.180.

If the political party wishes to assist a statewide nominee with the cost of advertising that advocates the election of a clearly identified statewide nominee, there is no contribution limit imposed but the statewide nominee is still subject to the percentage restriction of KRS 121.150(24). When an in-kind contribution is made on behalf of more than one statewide nominee, the amount must be allocated among the statewide nominees in proportion to the relative benefit each is expected to receive.

In addition, there is nothing in KRS Chapter 121 to prohibit a statewide nominee's campaign from furnishing campaign materials to the political party. Provided the materials are paid for by the campaigns, there would be no expenditure on the part of the political party. The materials may be displayed in or distributed from the political party's headquarters without being considered a contribution provided that no additional expense is incurred by the political party.

- (7) Under what circumstances may a statewide nominee's campaign communicate with a political party?

KREF Advisory Opinion 2003-003 provides a more detailed history of prior definitions of "independent expenditures" under Kentucky law and subsequent responses to case law such as Martin v. Commonwealth, 96 S.W.3d 38 (Ky. 2003).

In Martin, the Kentucky Supreme Court explained that "[t]he existence or absence of communication between a potential spender and a candidate, slate or agent thereof is relevant only to whether an expenditure is a contribution or an independent expenditure." Id. at 52. As stated in KREF Advisory Opinion 2003-003, "the Court clearly intended to distinguish consultation between a potential spender and a candidate or slate of candidates regarding the specifics of an advertising expenditure from the ordinary communication between a nominee for statewide office and his or her party executive committee regarding general campaign information." The above response to Question (6) provides more detail concerning the distinction between an independent expenditure and an in-kind contribution by a political party to a statewide nominee.

Furthermore, we can confirm the prior guidance rendered under KREF Advisory Opinion 2003-003 relating to communications between a political party and statewide nominee:

- There is nothing to prohibit a political party from informing its statewide nominees of its campaign plan and budget.
- There is nothing to prohibit a political party from meeting with its statewide nominees for the purpose of discussing grass roots activity. Provided the expenses associated with these meetings relate to generic party activity to benefit all statewide nominees, no contribution would result.
- There is nothing in KRS Chapter 121 to prohibit a political party from assisting its statewide nominees with the logistics associated with the setup of campaign appearances. Provided any expenses incurred by the political party associated with this logistical assistance will

benefit all statewide nominees as opposed to assisting the gubernatorial slate nominees exclusively, no contribution would result.

- (8) Excluding the issues addressed in this request, does the other advice offered in Advisory Opinion 2003-003 remain valid?

Generally speaking, the following guidance provided under KREF Advisory Opinion 2003-003 remains valid:

- A political party would be required to either charge a statewide nominee a fair market price for a voter registration or telephone list or the value of such items should be recorded and reported as an in-kind contribution from the political party to the statewide nominee.
- A voter mailing list furnished by a statewide nominee to a political party to benefit other candidates for Kentucky office would constitute an impermissible contribution under KRS 121.180(10) unless fair market value was paid.
- A political party may expend funds to provide a speaker at an event to benefit all statewide nominees. However, if the speaker is sent to an event to benefit an individual statewide nominee, the expenditures incurred by the political party would result in a contribution to the statewide nominee.
- KRS Chapter 121 imposes no restrictions on the manner in which a gubernatorial slate may organize its campaign. Therefore, other than the position of a committee chairman and the requirement that the slate campaign committee appoint a treasurer, there is nothing to prohibit an organizational structure with an advisory board of volunteers as described in KREF Advisory Opinion 2003-003.

Please keep in mind that this advisory opinion is based on the specific facts set forth in your written request. If you have any questions concerning this advisory opinion, please do not hesitate to contact the Registry. Thank you.

Very truly yours,

Connie Verrill Murphy  
General Counsel